

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LORI LEE CRULL,

Plaintiff,

v.

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL &
HEALTH SERVICES; KYLE
BUNGE, in his official and individual
capacity; and STEVE M. LOWE, in his
official and individual capacity,

Defendants.

NO: 2:13-CV-426-RMP

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT is Defendants' Motion for Summary Judgment,

ECF No. 29. The Court has reviewed the filings, the response memorandum (ECF No. 58), the reply memorandum (ECF No. 68), has heard from counsel, and is fully informed.

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1 BACKGROUND

2 Plaintiff Lori Lee Crull owned and operated the Little Lambs Learning
3 Center (hereinafter “LLLC”) from 2008 to 2011. ECF No. 59 at 2. The LLLC was
4 a daycare facility licensed by the Washington State Department of Early Learning
5 (“DEL”). ECF No. 30 at 2. Many of Ms. Crull’s clients had their children’s
6 daycare compensated by the State through the Working Connections Child Care
7 program. ECF No. 59 at 2. Ms. Crull contends that her clientele included a large
8 proportion of children who required special services. *Id.* at 3.

9 DEL is a Washington State administrative agency charged with discretionary
10 authority regarding issuing, suspending, revoking, or denying childcare licenses, as
11 well as issuing compliance and enforcement orders requiring daycare facilities to
12 follow licensing rules and regulations. ECF No. 30 at 2. As part of its statutory
13 mandate, DEL conducts inspections at state licensed child care facilities, including
14 Ms. Crull’s LLLC. *Id.*

15 DEL does not conduct criminal fraudulent billing investigations. *Id.* at 6. If
16 DEL suspects that a licensed daycare facility is engaged in fraudulent billing
17 practices, DEL can refer its concerns to the Washington State Office of Fraud and
18 Accountability (“OFA”), which then initiates a criminal fraud investigation. *Id.*
19 OFA is an administrative agency under the umbrella of the Washington State

1 Department of Social and Health Services (“DSHS”).¹ *Id.* at 8. The Assistant
2 Director of DEL, Robert McLellan, was the DEL administrator charged with
3 discretionary authority to refer suspected fraudulent billing to OFA for criminal
4 investigation. *Id.* at 6.

5 In 2011, Ms. Crull was subject to three separate Facility Licensing
6 Compliance Agreements with DEL. *Id.*; ECF No. 59 at 21. The underlying
7 complaints involved insufficient first aid kits, damaged facilities, employee
8 background check delays, and the incorrect use of a medicine as a cleaning agent.
9 ECF No. 59 at 21.

10 In 2011, DEL was considering denying Ms. Crull’s license renewal due to
11 various concerns about the LLLC’s operations. ECF No. 30 at 2. Ms. Crull already
12 had received the maximum four interim licenses permitted by DEL. *Id.* Over time,
13 DEL had collected a number of complaints, from both parents and other persons,
14 about the LLLC. *Id.* at 3–5. Ms. Crull notes that, while these complaints existed,
15 the vast majority were found to be “not valid” or unsubstantiated. ECF No. 59 at
16 7–19. DEL also suspected that Ms. Crull was not providing the State with accurate
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18 ¹ Defendants originally contended that DEL was part of DSHS. ECF No. 30 at 12.
19 However, starting in June 2010, DEL became a separate executive branch agency
20 of the State of Washington. ECF No. 69 at 9.

1 information and was overbilling for daycare services not being provided, including
2 for children who did not attend the LLLC and field trips which did not in fact
3 occur.² ECF No. 30 at 5. Given the available information, DEL determined that
4 Ms. Crull did not satisfy the suitability and character license requirements, and
5 accordingly did not approve renewal of Ms. Crull's license. *Id.* at 7.³

6 Robert McLellan reported DEL's evidence of fraud, concerns, and third-
7 party complaints to OFA for investigation. *Id.* DEL turned over the records and
8 information available to DEL relating to the suspected fraud. *Id.*

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11 ² Ms. Crull disputes a number of factual allegations made by Defendants
12 concerning DEL's thought process and rationale underlying the agency's decision
13 to disqualify her license. *See* ECF No. 59 at 21–22. However, disputes as to DEL's
14 license disqualification decision are not material to the case at hand as DEL is not a
15 defendant in this lawsuit.

16 ³ Ms. Crull disputes the basis of DEL's decision to issue its letter of
17 disqualification. ECF No. 59 at 24. However, as DEL is not a party to this lawsuit,
18 its rationale in denying Ms. Crull a license renewal is immaterial. Ms. Crull's
19 allegations concerning OFA's role in DEL's decision will be considered
20 separately. *See* Part V(B)(3).

1 At the time DEL decided to issue Ms. Crull a letter of disqualification,
2 OFA's fraud investigation was pending. *Id.* OFA was in the process of obtaining a
3 search warrant to be executed on the LLLC. *Id.* DEL, after consulting with OFA,
4 stayed issuance of Ms. Crull's letter of disqualification so it would arrive
5 simultaneously with OFA's execution of the search warrant.⁴ ECF No. 69 at 9. The
6 agencies believed this tactic would reduce the possibility of Ms. Crull's destroying
7 or removing records relevant to OFA's investigation. *Id.*

8 DEL issued Ms. Crull the letter of disqualification on December 20, 2011.⁵
9 ECF No. 37-2. The letter of disqualification notified Ms. Crull of her

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11 ⁴ Although Defendants allege that OFA was not consulted or involved in the
12 decision by DEL to issue a letter of disqualification, ECF No. 30 at 8, emails
13 between DEL and OFA officials demonstrate that the timing concerning the
14 issuance of the letter of disqualification was discussed between the two agencies.

15 See ECF No. 60-23, 24.

16 ⁵ Ms. Crull alleges that she did not receive notice of the denial of her license
17 renewal under a letter dated February 10, 2012, ECF No. 60-19, which Ms. Crull
18 did not receive until late March 2012. ECF No. 59 at 25. However, the letter
19 Ms. Crull points to, ECF No. 60-19, notes that Ms. Crull received the DEL
20 disqualification letter on December 20, 2011. *Id.* at 1. Additionally, despite stating

1 administrative appeal rights should she choose to challenge DEL's licensing
2 decision. *Id.* at 2. The letter advised Ms. Crull that her license renewal had been
3 denied due to a variety of reasons including that she did not use appropriate
4 discipline and that she was uncooperative with child protective services. *Id.* at 1.
5 The letter also noted that Ms. Crull was "currently under investigation by the
6 Office of Fraud and Accountability for theft."⁶ *Id.* Ms. Crull alleges that, despite
7 the division of responsibilities between the agencies, DEL's licensing decision was
8 largely based on OFA's fraud investigation. ECF No. 59 at 24–26.

9 Instead of appealing the DEL license disqualification decision, Ms. Crull
10 voluntarily entered into a settlement agreement. *See* ECF No. 37-1. In the

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12 that she was not notified until February 10, 2012, Ms. Crull mentions that the
13 December 20, 2011, letter advised her that she was disqualified from working with
14 children. ECF No. 59 at 26. As the exact date Ms. Crull received a disqualification
15 letter from DEL is immaterial, this dispute does not raise a genuine issue of
16 material fact.

17 ⁶ Although Ms. Crull correctly notes that the February 20, 2012, letter she received
18 only notes that she was under investigation by OFA for theft, the December 20,
19 2011, letter of disqualification listed several additional reasons underlying DEL's
20 decision to deny her license renewal. ECF No. 37-2 at 2.

1 settlement agreement, DEL withdrew the letter disqualifying Ms. Crull from
2 working with children in child care facilities. *Id.* at 1. In return, Ms. Crull agreed to
3 voluntarily relinquish her child care license. *Id.* Ms. Crull was barred from being
4 either a director or owner of a child care facility until such time as she regained her
5 license. *Id.* at 2. The agreement noted that “Ms. Crull agrees not to seek a child
6 care license of any kind until December 21, 2016 or upon written documentation
7 that the investigation into her billing practices is complete, whichever is sooner.”
8 *Id.* As part of the agreement, Ms. Crull agreed to the following release of liability
9 provision:

10 As and for consideration for this agreement, Lori Crull and her
11 successors and/or assigns hereby agrees to release and forever
12 discharge the Department of Early Learning for the State of
13 Washington and its officers, agents, employees, agencies and from any
14 and all existing and/or future liability, claims, damages and causes of
15 action of any nature whatsoever arising out of occurrences, or events
16 that are the subject of this agreement. IT IS UNDERSTOOD AND
17 AGREED that this provision is intended to cover all actions, causes of
action, claims and demands for, upon, or by reason of any economic
and/or non-economic damages, personal bodily injuries, sickness,
disease, and damage to or other damage or injury of any nature which
may be traced either directly or indirectly to the occurrence(s) and/or
events giving rise to this agreement, as now appearing or as may appear
at any time in the future, regardless of how remotely they may be
related to the aforesaid matter.

18 *Id.* at 3.

19 Defendant Kyle Bunge was the investigator assigned by OFA to investigate
20 the fraud referral from DEL. ECF No. 30 at 12. Mr. Bunge relied upon the

1 information contained in an audit conducted of the LLLC's records which
2 documented a number of instances of suspected fraud.⁷ *Id.* Mr. Bunge signed the
3 affidavit to obtain the search warrant executed on the LLLC. *Id.*

4 Defendant Steve Lowe was Mr. Bunge's supervisor and the Senior Director
5 of OFA. *Id.* at 13. Mr. Lowe directed that a search warrant be pursued, handled
6 media contacts relating to the search warrant, and ordered that the investigation be
7 referred to both federal and state prosecution agencies. *Id.* The United States
8 Attorney for the Eastern District of Washington has declined to press charges
9 against Ms. Crull. ECF No. 60-28. The Spokane County Prosecuting Attorney's
10 Office has not yet determined whether charges will be filed. ECF No. 30 at 16.

11 OFA executed a search warrant on the LLLC on December 20, 2011. ECF
12 No. 59 at 4; *see also* ECF No. 40-1. OFA informed the media that a fraud
13 investigation was pending and that a search warrant was being executed on the
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15 ⁷ Ms. Crull disputes that there was evidence of fraud, stating that "overpayments
16 through DSHS' Social Service Payment System ("SSPS") are not uncommon, nor
17 are they fraudulent." ECF No. 59 at 35. This lawsuit, however, concerns
18 Defendants' conduct and tactics during their investigation. *See generally* ECF No.
19 1-1. Therefore, this Court need not determine whether Ms. Crull was in fact
20 defrauding the State of Washington to adjudicate the instant motion.

1 LLLC.⁸ ECF No. 30 at 17. This resulted in media coverage both concerning the
2 investigation and the execution of the search warrant on the LLLC. ECF No. 40 at
3 4; ECF No. 59 at 28. OFA concluded its investigation on September 5, 2012. *See*
4 ECF No. 39-1.

5 Ms. Crull filed for bankruptcy on January 17, 2013. ECF No. 59 at 39. On
6 April 9, 2013, the Bankruptcy Court signed an order approving the employment of
7 legal counsel to pursue the tort claims raised in this lawsuit. ECF No. 62-1.

8 Ms. Crull filed the instant complaint against the DSHS, Kyle Bunge, and
9 Steve Lowe in Spokane County Superior Court on December 13, 2013. ECF No. 1-

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11 ⁸ Based on the evidence submitted by Ms. Crull, this Court notes five online news
12 articles that discuss Defendants' investigation into the LLLC. *See* ECF No. 60-6, 7,
13 8, 9, 10. Ms. Crull has, however, not provided any evidence of Defendants holding
14 a press conference or what may have been discussed or disclosed at such a
15 meeting. While Mr. Lowe notes that he "was the point person for OFA for media
16 contact" and that "[t]he media contacted OFA with respect to the Little Lambs
17 Learning Center investigation," ECF No. 40 at 4, Ms. Crull only has submitted the
18 five online news articles referenced above. In addition to the five news articles,
19 Mr. Lowe generally relays that "[t]he information I reported to the media identified
20 that there were 'allegations' of fraud and an investigation was pending." *Id.*

1 1. Defendants removed the action to the District Court for the Eastern District of
2 Washington on December 23, 2013. ECF No. 1. Defendants filed the instant
3 motion for summary judgment on September 18, 2015. ECF No. 29. Ms. Crull
4 filed a response memorandum on October 16, 2015. ECF No. 58. Defendants filed
5 a reply memorandum on November 6, 2015. ECF No. 68. This Court heard oral
6 argument on November 19, 2015. ECF No. 78.

7 **DISCUSSION**

8 **I. Summary Judgment Standard**

9 Summary judgment is appropriate when the moving party establishes that
10 there are no genuine issues of material fact and that the movant is entitled to
11 judgment as a matter of law. Fed. R. Civ. P. 56(a). If the moving party
12 demonstrates the absence of a genuine issue of material fact, the burden shifts to
13 the non-moving party to set out specific facts showing that a genuine issue of
14 material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986). A
15 genuine issue of material fact requires “sufficient evidence supporting the claimed
16 factual dispute . . . to require a jury or judge to resolve the parties’ differing
17 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*,
18 809 F.2d 626, 630 (9th Cir. 1987). “Where the record taken as a whole could not
19 lead a rational trier of fact to find for the non-moving party, there is no ‘genuine

issue for trial.”” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citation omitted).

The evidence presented by both the moving and non-moving parties must be admissible. Fed. R. Civ. P. 56(c)(2). Evidence that may be relied upon at the summary judgment stage includes “depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . admissions, [and] interrogatory answers.” Fed. R. Civ. P. 56(c)(1)(A). The Court will not presume missing facts, and non-specific facts in affidavits are not sufficient to support or undermine a claim. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888–89 (1990). In evaluating a motion for summary judgment, the Court must draw all reasonable inferences in favor of the non-moving party. *Dzung Chu v. Oracle Corp. (In re Oracle Corp. Secs. Litig.)*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

II. Whether Ms. Crull is Barred from Alleging Claims Against Defendants by the Release of Liability in the Settlement Agreement

Defendants argue that Ms. Crull's settlement agreement with DEL represented a full and complete resolution of her license disqualification. Defendants attempt to use the release of liability provision as a shield to argue that Ms. Crull released all claims against the State of Washington, DSHS, DEL, and all other State agencies and employees. ECF No. 29 at 8. Ms. Crull contends that the

1 settlement agreement only releases DEL and its employees from liability. ECF No.
2 58 at 5.

3 The settlement agreement does not support Defendants' position. Ms. Crull
4 agreed to release "the Department of Early Learning *for* the State of Washington
5 and *its* officers, agents, employees [and] agencies." ECF No. 37-1 at 3 (emphasis
6 added). This language, restricted to DEL, indicates that the provision only released
7 claims against DEL, not the State of Washington as a whole.

8 Defendants rely on the second sentence, which defines the provision's scope
9 as "intended to cover all actions . . . which may be traced either directly or
10 indirectly to the occurrence(s) and/or event(s) giving rise to this agreement." *Id.*
11 This language merely defines the scope of Ms. Crull's waiver of potential claims
12 against DEL. The Court agrees with Defendants that "plaintiff waived any right to
13 a claim of damages as a result of the loss of her license against DEL 'and its
14 agencies.'" ECF No. 68 at 7. However, DEL is not a defendant in the instant
15 lawsuit; instead, the Defendants are DSHS, and OFA employees Kyle Lowe and
16 Steve Bunge. *See generally* ECF No. 1-1. Nor are any Defendants "officers,
17 agents, employees, [or] agencies" of DEL.

18 A plain reading of the settlement agreement's release of liability provision
19 demonstrates that it is limited to DEL, and not the State of Washington as a whole.
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1 As such, the Court will not find that Ms. Crull is barred from bringing this lawsuit
2 by the settlement agreement.

3 **III. Whether the Doctrine of Collateral Estoppel Bars Ms. Crull's Action**

4 Defendants argue that collateral estoppel prevents relitigation of Ms. Crull's
5 claims as they were resolved by a final order or disposition in an administrative
6 proceeding. ECF No. 29 at 9. Ms. Crull contends that collateral estoppel does not
7 apply because Defendants were not parties to the settlement agreement. ECF
8 No. 58 at 10.

9 In determining whether collateral estoppel applies, this Court looks to
10 Washington State law. *See Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481–82
11 (1982) (noting how 28 U.S.C. § 1738 commands federal courts “to accept the rules
12 chosen by the State from which the judgment is taken”). In Washington,

13 the party asserting [collateral estoppel] must prove: (1) the issue
14 decided in the prior adjudication is identical with the one presented in
15 the second action; (2) the prior adjudication must have ended in a final
16 judgment on the merits; (3) the party against whom the plea is asserted
17 was a party or in privity with the party to the prior adjudication; and
18 (4) application of the doctrine does not work an injustice.

19 *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262–63 (1998).

20 “Collateral estoppel precludes a party from relitigating an issue of fact that the
party already has litigated to final judgment.” *Miles v. State, Child Protective
Servs. Dept.*, 102 Wn. App. 142, 153 (2000).

1 The doctrine of collateral estoppel does not bar Ms. Crull's claims. The
2 settlement agreement between Ms. Crull and DEL was neither an "adjudication"
3 nor a "final judgment on the merits." The settlement agreement noted that
4 "Ms. Crull does not admit the allegations contained in the December 20, 2011
5 letter" and "the Department does not concede that there are no grounds to
6 disqualify Mr. [sic] Crull from having unsupervised access to child care children."
7 ECF No. 37-1 at 3. As such, the settlement agreement did not pass judgment upon
8 the merits of Ms. Crull's case: both parties merely agreed, for whatever reason,
9 that a settlement was an appropriate resolution.

10 Even if the settlement agreement had constituted a "final judgment on the
11 merits," the issues in the instant lawsuit are distinguishable. The settlement
12 agreement resolved issues arising out of DEL's decision to disqualify Ms. Crull's
13 child care license while the instant lawsuit raises numerous allegations against
14 DSHS concerning the OFA fraud investigation into Ms. Crull's billing practices.
15 Collateral estoppel does not bar Ms. Crull's claims.

16 **IV. Whether Ms. Crull is the Real Party in Interest**

17 Defendants argue that Ms. Crull, as a debtor in chapter 7 bankruptcy, is not
18 the real party in interest and cannot prosecute claims accrued on behalf of the
19 bankruptcy estate. ECF No. 29 at 34.

“The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action.” Fed. R. Civ. P. 17(a)(3). Here, the bankruptcy trustee has authorized and ratified Ms. Crull’s pursuit of this action. ECF No. 58 at 38; *see also* ECF No. 62-1. Ms. Crull therefore has authority to prosecute these claims.

V. Whether Genuine Issues of Material Fact Preclude Summary Judgment on Ms. Crull's Civil Rights Cause of Action Under 42 U.S.C. § 1983

To state a claim under 42 U.S.C. § 1983, “a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.” *West v. Atkins*, 487 U.S. 42, 48 (1988). Defendants argue that (1) DSHS, Steve Lowe in his official capacity, and Kyle Bunge in his official capacity are not “person[s]” as under § 1983 and (2) that Ms. Crull has failed to demonstrate that Steve Lowe and Kyle Bunge, in their personal capacities, violated a right secured by the Constitution. ECF No. 29 at 10–17; ECF No. 68 at 5–13.

A. Sovereign Immunity and the Definition of “Person” Under § 1983

Defendants have waived their Eleventh Amendment immunity by affirmatively choosing to remove this action to federal court. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 624 (2002) (“We conclude that the State’s action joining the removing of this case to federal court waived its Eleventh

1 Amendment immunity.”). A waiver of Eleventh Amendment immunity does not,
2 however, automatically render a party susceptible to suit under § 1983. A
3 plaintiff’s remedy under § 1983 is limited to suits against “person[s].” 42 U.S.C.
4 § 1983. Under *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989),
5 neither the State nor “arms of the state” nor state officials acting in their official
6 capacities are “person[s]” liable to suit under § 1983. *Id.* at 66, 70–71.

7 Ms. Crull urges this Court to find that Defendants, by removing this action
8 to federal court and waiving their Eleventh Amendment immunity, have implicitly
9 consented to suit under § 1983. ECF No. 58 at 13. However, States, arms of the
10 State, and state officials in their official capacities are not “person[s]” under
11 § 1983, and therefore are not liable to suit. *See Will*, 491 U.S. at 66, 70–71.
12 Removing an action to federal court does not automatically transmute an actor into
13 a “person.” *See, e.g., Bank of Lake Tahoe v. Bank of Am.*, 318 F.3d 914, 918 (9th
14 Cir. 2003).

15 During oral argument, Ms. Crull alleged that her § 1983 cause of action
16 against DSHS and the OFA officers in their official capacities should not be
17 dismissed as she had moved for injunctive relief against all Defendants. This
18 alleged injunction was to enjoin Defendants from making any future stigmatic
19 statements about Ms. Crull to the press. However, as Ms. Crull did not demand
20 injunctive relief in her complaint, *see generally* ECF No. 1-1, the Court will not

1 allow Ms. Crull to belatedly concoct reasons to maintain her § 1983 cause of action
2 against Defendants who are not included within the scope of “person.”

3 As waiving Eleventh Amendment immunity does not render a party liable to
4 suit under § 1983 that would not otherwise be so, the Court **dismisses with**
5 **prejudice** Ms. Crull’s § 1983 civil rights cause of action against DSHS, Steve
6 Lowe in his official capacity, and Kyle Bunge in his official capacity.

7 **B. Ms. Crull’s Alleged Violations of Constitutional Rights**

8 Defendants Steve Lowe and Kyle Bunge, in their individual capacities, are
9 “person[s]” who are liable to suit under § 1983. Ms. Crull puts forth a number of
10 theories, each alleging a violation of the Fourteenth Amendment Due Process
11 Clause for either (1) depriving her of a property or liberty interest or (2) failing to
12 afford her procedural protections required by law. ECF No. 58 at 14. The alleged
13 constitutional rights and interests raised by Ms. Crull include: (1) the right to be
14 free from stigma which alters an existing right; (2) the right to notice and a hearing
15 before criminal charges are pursued by DSHS; (3) the right to pursue her chosen
16 occupation free from government blacklisting; and (4) the right to the timely return
17 of her property seized by DSHS. *Id.*

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1 **1. Due Process Interest in Reputation and Being Free From Government-
2 Imposed Stigma**

3 Ms. Crull argues that Defendants, through their allegedly overzealous
4 criminal investigation, afflicted her with a stigma which has both damaged her
5 reputation and undermined her ability to carry on her business. *Id.*

6 The Supreme Court first recognized a constitutional due process interest in
7 reputation in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). In *Constantineau*,
8 a Wisconsin police chief caused a notice to be posted in retail liquor stores
9 advising merchants that all sales or gifts of liquor were forbidden to
10 Ms. Constantineau. *Id.* at 435. Ms. Constantineau was given neither notice nor an
11 opportunity to be heard before the notices were publically posted. *Id.* The Court
12 noted that “[w]here a person’s good name, reputation, honor, or integrity is at stake
13 because of what the government is doing to him, notice and an opportunity to be
14 heard are essential.” *Id.* at 437.

15 The Court elaborated on the procedural protections afforded an individual’s
16 reputation in *Paul v. Davis*, 424 U.S. 693 (1976). In *Paul*, a police chief alerted
17 local merchants to possible shoplifters by distributing a flyer with various
18 mugshots, including that of Davis. *Id.* at 695. While Davis had been arrested for
19 shoplifting, he had not been convicted of the charge. *Id.* at 696. The Court noted
20 that its prior decisions did not establish that “reputation alone, apart from some
more tangible interests such as employment, is either ‘liberty’ or ‘property’ by

1 itself sufficient to invoke the procedural protection of the Due Process Clause.” *Id.*
2 at 701.

3 In essence, an allegedly defamatory statement or action by a public official
4 is not automatically a deprivation of liberty or property without due process of law.
5 *Id.* at 702. For example, the Court interpreted *Constantineau* as holding that
6 procedural due process protections were implicated as the notice deprived
7 Ms. Constantineau of a right she had previously enjoyed: the ability to buy liquor.
8 *Id.* at 708. In contrast, the Court rejected Davis’ allegations as he merely “claims
9 constitutional protection against the disclosure of the fact of his arrest on a
10 shoplifting charge.” *Id.* at 713.

11 Following *Paul*, constitutional allegations of injury to reputation require
12 both some official stigmatic conduct and a “plus,” usually the denial of a tangible
13 interest such as employment. *Id.* at 701. To sufficiently allege a claim, “the
14 plaintiff must show that the injury to his reputation was inflicted *in connection with*
15 the deprivation of a federally protected right.” *Hart v. Parks*, 450 F.3d 1059, 1070
16 (9th Cir. 2006) (emphasis in original). The plaintiff must also demonstrate “that the
17 injury to reputation *caused* the denial of a federally protected right.” *Id.* (“Hart has
18 not proffered any evidence that he lost his job *because of* the defamatory
19 statements.”) (emphasis in original). Put another way, a plaintiff must show some
20 “change of legal status” as a result of the alleged government defamation. *See*

1 Miller v. California, 355 F.3d 1172, 1179 (9th Cir. 2004) (no due process violation
2 where plaintiff was incorrectly placed on child abuse index as plaintiff was “not
3 legally disabled from doing anything [he] otherwise could do”).

4 Ms. Crull has articulated a number of different tangible interests that could
5 constitute the “plus” required in conjunction with the alleged defamatory conduct.
6 First, Ms. Crull claims that that Defendants’ investigation into the fraud allegations
7 was stigmatic and the denial of her license was the “plus” necessary to allege a
8 constitutional violation. ECF No. 58 at 16. Second, Ms. Crull alleges that
9 Defendants are purposely keeping their investigation open, barring her from
10 reapplying for a child care license. *Id.* Finally, during oral argument, Ms. Crull
11 contended that the ongoing denial of her chosen occupation constituted the
12 required “plus.”

13 As to Ms. Crull’s license disqualification, the Court does not find that
14 Ms. Crull has demonstrated a genuine issue of material fact simply due to the
15 factual timeline as it has been presented to the Court. As alleged by Ms. Crull,
16 Defendants’ actions that allegedly caused public stigma and damage to reputation
17 only occurred after the search warrant was executed on her business. *See* ECF
18 No. 58 at 16. DEL made the decision to disqualify Ms. Crull’s license before, or at
19 least simultaneously to, the execution of the search warrant. *Compare* ECF No. 37-
20 2 with ECF No. 59 at 4 (DEL’s letter of disqualification was dated December 20,

1 2011, the same day OFA executed the search warrant on the LLLC). It
2 chronologically cannot be the case that any stigma resulting from Defendants'
3 allegedly unnecessary involvement of media during the execution of the search
4 warrant caused DEL's decision to disqualify Ms. Crull's day care license.

5 Ms. Crull's second allegation concerning the delay in concluding
6 Defendants' investigation also fails. Defendants' allegedly stigmatic statements
7 and conduct arose from the publication of Defendants' investigation, not from any
8 delay in closing the investigation. Ms. Crull also presents no evidence
9 demonstrating that any alleged unnecessary delay was stigmatic. Further, Ms. Crull
10 has failed to demonstrate that the ability to re-apply for a child care license, as
11 opposed to the license itself, is a "tangible interest" that can qualify as a "plus"
12 under *Paul*. A theory based on unnecessary delay is especially problematic
13 considering that OFA concluded their investigation on September 5, 2012, less
14 than a year after the search warrant was executed on the LLLC. *See* ECF No. 39-1.
15 As above, the allegedly improper delay, if it was stigmatic at all, did not cause the
16 loss of Ms. Crull's license.

17 During oral argument, Ms. Crull proffered an additional, yet related,
18 theoretical tangible interest: that the alleged stigma had (and continued to) cause
19 the ongoing denial of her chosen occupation. Initially, the Court is unclear
20 concerning how the amorphous right to pursue one's chosen occupation

1 substantively differs from Ms. Crull's allegations regarding her license
2 disqualification, considering that both result in the same prohibition. Regardless,
3 Ms. Crull agreed in her settlement agreement with DEL "not to seek a child care
4 license of any kind until December 21, 2016 or upon written documentation that
5 the investigation into her billing practices is complete, whichever is sooner." ECF
6 No. 37-1 at 2.

7 Defendants' investigation into Ms. Crull's billing practices concluded on
8 September 5, 2012. ECF No. 39-1. A constitutional due process claim for the
9 violation of a person's occupational liberty is limited to extreme cases, such as a
10 "government blacklist." *See Engquist v. Or. Dept. of Agric.*, 478 F.3d 985, 997 (9th
11 Cir. 2007) (quoting *Olivieri v. Rodriguez*, 112 F.3d 406, 408 (7th Cir. 1997)). The
12 Court is unwilling to find that Ms. Crull was unlawfully "excluded from her
13 occupation", *see id.* (quoting *Olivieri*, 122 F.3d at 408), when she agreed to abide
14 by an exclusionary limitation in a settlement agreement.

15 Further, similar to Ms. Crull's other allegations, any ongoing denial of
16 Ms. Crull's chosen occupation is unrelated to Ms. Crull's alleged injury to
17 reputation. Even assuming that Defendants' media reports were stigmatic,
18 Ms. Crull has failed to demonstrate that any resulting injury to reputation caused
19 the alleged ongoing denial of her chosen occupation. In essence, Ms. Crull has
20 failed to provide any evidence as to *how* she was deprived of her chosen

1 occupation *because of* the allegedly defamatory statements. *See Hart*, 450 F.3d at
2 1070. As such, the Court finds that Ms. Crull has not alleged sufficient facts to
3 demonstrate a genuine issue of material fact as to any constitutional injury to
4 reputation resulting from Defendants' allegedly stigmatic conduct.

5 **2. Right to Notice and Hearing Before Criminal Charges Are Pursued**

6 Ms. Crull alleges that Defendants failed to afford her procedural protections
7 guaranteed by the Fourteenth Amendment Due Process Clause when they did not
8 provide her with notice of the criminal investigation and an opportunity to be heard
9 before charges were referred to both federal and state prosecuting agencies.

10 First, Ms. Crull argues that RCW 43.20A.660 requires Defendants to
11 provide her with notice and an opportunity to be heard. ECF No. 58 at 17. RCW
12 43.20A.660 provides:

13 [b]efore any violation of chapter 43.20A RCW is reported by the
14 secretary to the prosecuting attorney for the institution of a criminal
15 proceeding, the person against whom such proceeding is contemplated
16 shall be given appropriate notice and an opportunity to present his or
17 her views to the secretary, either orally or in writing, with regard to
18 such contemplated proceeding.

19 RCW 43.20A.660.

20 The Court finds that RCW 43.20A.660 is inapplicable to this matter. The
21 procedural protections required by RCW 43.20A.660 are only mandated where
22 DSHS is referring violations of chapter 43.20A to a prosecuting agency. RCW
23 43.20A.660. Chapter 43.20A establishes DSHS as an administrative agency and

1 contains provisions that include the Secretary's delegation of powers and duties,
2 RCW 43.20A.110, a limitation on compensation for per diem or mileage, RCW
3 43.20A.390, and the establishment of the state council on aging. RCW
4 43.20A.680. While chapter 43.20A does mandate that DSHS perform background
5 checks on individuals seeking to care for children, RCW 43.20A.710, the provision
6 does not address criminal allegations of fraud, theft, and forgery.

7 Ms. Crull cites RCW 74.04.290 as evidence of the two provisions' interconnectivity. ECF No. 58 at 17. RCW chapter 74.04 creates and governs the functions of OFA. RCW 74.04.290, however, addresses investigative tools available to OFA and only references chapter 43.20A in that "[s]ubpoenas issued under this power shall be under RCW 43.20A.605." RCW 74.04.290. Ms. Crull fails to demonstrate how this provision supports the argument that Defendants referred a violation of chapter 43.20A to the prosecuting agencies. RCW 43.20A.660 is only relevant where violations of chapter 43.20A are at issue. RCW 74.04.290 does not change the plain meaning of the provision.

16 Defendants' investigation was into allegations of theft and forgery. *See* ECF No. 39 at 2. It was concerning these charges that OFA referred their investigation to both federal and state prosecuting agencies. *See id.* at 4. These offenses are criminal violations under chapter 9A. *See* RCW 9A.56.030 (First Degree Theft); RCW 9A.56.040 (Second Degree Theft); RCW 9A.60.020 (Forgery). As RCW

1 43.20A.660 only applies when DSHS refers violations of chapter 43.20A,
2 Ms. Crull was not entitled to the provision's procedural safeguards.

3 Ms. Crull also alleges that her due process rights were violated by
4 Defendants' failure to communicate or meet with her during their investigation.
5 ECF No. 58 at 18. However, Ms. Crull does not cite to any authority to support her
6 position, and the Court concludes that there is no due process right to an
7 opportunity to be heard while an investigation is ongoing but before formal
8 charges have been filed. If Ms. Crull were correct, any potential criminal defendant
9 would have the constitutional right to a hearing before a police officer forwarded
10 any investigation or report to a prosecuting authority. As there is no established
11 due process right to receive notice and a hearing *before* criminal charges are filed,
12 Defendants were not required to meet with Ms. Crull before referring their fraud
13 investigation to state and federal prosecuting agencies.

14 **3. Right to Pursue Chosen Occupation Free From Government
Blacklisting**

15 Ms. Crull alleges Defendants violated her substantive due process rights as
16 she "is unable to pursue an occupation and this inability is caused by government
17 actions that were arbitrary and lacking a rational basis." ECF No. 58 at 18.
18

19 Ms. Crull argues that Defendants' overzealous investigation, including
20 unexplained delay and improper coordination between DEL and Defendants
concerning her license disqualification, amount to government blacklisting.

1 The Supreme Court has “indicated that the liberty component of the
2 Fourteenth Amendment’s Due Process Clause includes some generalized due
3 process right to choose one’s field of private employment, but a right which is
4 nevertheless subject to reasonable government regulation.” *Conn v. Gabbert*, 526
5 U.S. 286, 291–92 (1999). This amorphous right has only been addressed in a few
6 circumstances. *See id.* at 293 (holding that an attorney’s “Fourteenth Amendment
7 right to practice one’s calling [was] not violated by the execution of a search
8 warrant, whether calculated to annoy or even to prevent consultation with a grand
9 jury witness”). The Court has “never held that the right to pursue work is a
10 fundamental right.” *Sagana v. Tenorio*, 384 F.3d 731, 742 (9th Cir. 2004).

11 The Ninth Circuit has “held that a plaintiff can make out a substantive due
12 process claim if she is unable to pursue an occupation and this inability is caused
13 by government actions that were arbitrary and lacking a rational basis.” *Engquist*,
14 478 F.3d at 997. Constitutional claims for the violation of occupational liberty are,
15 however, limited to “extreme cases, such as a ‘government blacklist, which when
16 circulated or otherwise publicized to prospective employers effectively excludes
17 the blacklisted individual from his occupation, much as if the government had
18 yanked the license of an individual in an occupation that requires licensure.’” *Id.* at
19 997–98 (quoting *Olivieri*, 122 F.3d at 408).

1 Ms. Crull urges the Court to equate her situation to that in *Benigni v. City of*
2 *Hemet*, 879 F.2d 473 (9th Cir. 1988). In *Benigni*, police officers continuously
3 harassed the plaintiff's bar and customers until the plaintiff was forced to sell his
4 business. *Id.* at 475 (listing daily bar checks, following customers leaving the bar,
5 staking out customers, and investigating an alleged bomb threat the day after the
6 plaintiff filed suit). The court held that "the evidence before the jury was sufficient
7 to support a conclusion that excessive and unreasonable police conduct was
8 intentionally directed towards Benigni's bar to force him out of business." *Id.* at
9 478.

10 Ms. Crull alleges that Defendants' overzealous investigation violated her
11 right to occupational liberty as (1) Defendants' investigation was the primary basis
12 for DEL's license disqualification and (2) Defendants' delay in concluding the
13 investigation keeps Ms. Crull from reapplying for a child care license. ECF No. 58
14 at 21. Neither is sufficient to allege a violation of a constitutional right.

15 Defendants deny that OFA had any role in Ms. Crull's license
16 disqualification, arguing that licensing decisions are solely the responsibility of
17 DEL. ECF No. 29 at 16. Ms. Crull claims that collusion is demonstrated by a
18 number of emails between DEL and OFA personnel, *see* ECF No. 60-23, 24, as
19 well as the settlement agreement and letter of disqualification, both of which
20 mention OFA's fraud investigation. ECF No. 37-1, 2. Ms. Crull also asserts that an

1 unidentified OFA official informed her that her license was being disqualified in
2 connection with OFA's investigation. ECF No. 60 at 19.

3 As noted by Ms. Crull, DEL officials did consult with OFA officials about
4 the LLLC in the referenced emails. *See* ECF No 60-23 at 3 ("We had a good
5 meeting at DEL yesterday and Little Lambs was discussed . . ."); *id.* at 6 ("I have
6 a meeting with DEL I would like for Kathleen to attend with me. It will be a
7 decision on how to proceed with the case as DEL wants to move forward with its
8 licensing issues."). Defendants argue that any contact between the two agencies
9 was merely a preventative measure to stop Ms. Crull from destroying records prior
10 to the execution of the search warrant. ECF No. 69 at 9.

11 However extensive OFA's involvement with DEL's licensing decision was,
12 it was nevertheless DEL's discretionary statutory authority to deny Ms. Crull a
13 license renewal. As it was DEL, not Defendants, that denied Ms. Crull a license
14 renewal, it consequently would be DEL who violated Ms. Crull's alleged right to
15 occupational liberty, not Defendants Lowe and Bunge. As discussed previously,
16 DEL is not a defendant in this lawsuit but was the entity identified in Ms. Crull's
17 release of liability. *See* ECF No. 37-1 at 3. Therefore, the Court finds that
18 Defendants Lowe and Bunge did not violate Ms. Crull's right to pursue an
19 occupation based on a licensing decision made by an entirely distinct
20 administrative agency.

1 Ms. Crull's allegation concerning investigatory delay also fails. The
2 Supreme Court has addressed pre-accusatorial delay in the criminal context. In
3 *United States v. Marion*, 404 U.S. 307 (1971), the Court held that the pre-
4 indictment delay by the Government did not violate the Due Process Clause as
5 “[n]o actual prejudice to the conduct of the defense is alleged or proved, and there
6 is no showing that the Government intentionally delayed to gain some tactical
7 advantage over appellees or to harass them.” *Id.* at 325. Prosecutors “are under no
8 duty to file charges as soon as probable cause exists but before they are satisfied
9 they will be able to establish the suspect’s guilt beyond a reasonable doubt.”
10 *United States v. Lovasco*, 431 U.S. 783, 791 (1977).

11 Ms. Crull alleges that Defendants’ delay in concluding the fraud
12 investigation was solely to deny her the opportunity to re-apply for a child care
13 license pursuant to the settlement agreement with DEL. Ms. Crull argues that
14 Defendants’ conduct was arbitrary and irrational. *See* ECF No. 58 at 21. However,
15 in the analogous criminal context, even lengthy pre-indictment delay does not
16 violate due process without a showing of nefarious intent.

17 Ms. Crull’s only evidence that Defendants meant to “harass” her is
18 speculative and drawn by inference from the four year delay itself. Further,
19 Defendants’ investigation into Ms. Crull’s billing practices concluded on
20 September 5, 2012, less than a year after the search warrant was executed on the

1 LLLC. ECF No. 39-1. Additionally, as Ms. Crull agreed to the restrictive time
2 limitation in the settlement agreement with DEL for applying for another license,
3 the Court is unwilling to find that Ms. Crull's constitutional rights were violated by
4 a provision to which Ms. Crull consented.

5 Overall, unlike in *Benigni*, Ms. Crull has failed to present any evidence that
6 Defendants' actions were excessive, unreasonable, or motivated by any
7 impropriety or nefarious purpose. Ms. Crull asks the Court to credit her inferences
8 and allegations of wrongdoing. Unsupported allegations and conclusions, at the
9 summary judgment stage, are insufficient to demonstrate a genuine issue of
10 material fact necessary to sustain a claim for the violation of occupational liberty.
11 Therefore, the Court finds that no genuine issue of material fact exists concerning
12 Ms. Crull's occupational liberty claim, which consequently cannot support a
13 § 1983 cause of action.

14 **4. Right to Timely Return of Property Seized by DSHS**

15 Ms. Crull alleges that her constitutional rights were violated by Defendants'
16 failure to timely return records seized pursuant to the search warrant. ECF No. 58
17 at 14. However, as Ms. Crull does not address this claim in any further detail, this
18 allegation is insufficient to state the deprivation of a constitutional right under
19 § 1983.

1 **5. Conclusion**

2 As the Court finds that Ms. Crull has failed to allege a constitutional
3 violation attributable to Defendants Steve Lowe or Kyle Bunge in their individual
4 capacities, Ms. Crull's § 1983 cause of action is **dismissed with prejudice**.

5 **VI. State Law Claims**

6 Ms. Crull alleges numerous Washington State tort law causes of action
7 against Defendants. Ms. Crull alleges that Defendants are liable for (1) negligence;
8 (2) negligent infliction of emotional distress; (3) intentional infliction of emotional
9 distress; (4) interference with business relationships; (5) defamation; (6) invasion
10 of privacy; (7) conversion; and (8) trespass. ECF No. 1-1 at 6–11.

11 The parties agree that this Court should retain supplemental jurisdiction over
12 the tort causes of action alleged by Ms. Crull. ECF No. 29 at 21; ECF No. 58 at 25.
13 Defendants argue that Ms. Crull's tort claims each should be dismissed for either a
14 failure to state a claim upon which relief can be granted or the absence of a
15 genuine issue of material fact. ECF No. 29 at 21. Ms. Crull argues that genuine
16 issues of material fact preclude summary judgment of the majority of her causes of
17 action. ECF No. 58 at 25. Ms. Crull **voluntarily dismisses** her conversion and
18 trespass causes of action. *Id.* at 38.

19 / / /

20 / / /

1 **A. Whether the Court Should Exercise Supplemental Jurisdiction Over**
2 **Ms. Crull's State Tort Causes of Action**

3 Under 28 U.S.C. § 1337(c), a district court

4 may decline to exercise supplemental jurisdiction over a claim under
5 subsection (a) if (1) the claim raises a novel or complex issue of State
6 law; (2) the claim substantially predominates over the claim or claims
7 which the district court has original jurisdiction; (3) the district court
8 has dismissed all claims over which it has original jurisdiction; or (4) in
9 exceptional circumstances, there are other compelling reasons for
10 declining jurisdiction.

11 28 U.S.C. § 1337(c). The parties each request that the Court retain jurisdiction over
12 Ms. Crull's state tort causes of action. ECF No. 29 at 21; ECF No. 58 at 25. Due to
13 the advanced nature of the lawsuit, the Court will exercise supplemental
14 jurisdiction over Ms. Crull's Washington State tort causes of action in the interest
15 of judicial economy.

16 **B. Whether Ms. Crull Failed to Exhaust Administrative Remedies**

17 Defendants argue that Ms. Crull's tort causes of action should be dismissed
18 due to Ms. Crull's failure to exhaust administrative remedies. ECF No. 29 at 22.
19 Defendants claim that these allegations should have been adjudicated in the
20 available administrative appellate review of the disqualification of Ms. Crull's
21 child care license. *Id.* at 23. Ms. Crull argues that (1) as DEL disqualified her
22 license based on OFA's ongoing fraud investigation, an administrative hearing
23 with DEL would be futile as Ms. Crull could not disprove that an investigation was
24 with DEL would be futile as Ms. Crull could not disprove that an investigation was

1 pending and (2) that many of her claims are based on DSHS' investigation, not on
2 DEL's licensing decision. ECF No. 58 at 26–27.

3 Under Washington law:

4 [e]xhaustion of administrative remedies is required when (1) a claim is
5 cognizable in the first instance by an agency alone, (2) the agency's
6 authority establishes clearly defined machinery for the submission,
7 evaluation, and resolution of complaints by aggrieved parties, and
8 (3) the relief sought can be obtained by resort to an exclusive or
9 adequate administrative remedy.

10 *Phillips v. King Cty.*, 87 Wn. App. 468, 479 (1997).

11 Ms. Crull's tort causes of action arise under Washington State common law.

12 See ECF No. 1-1 at 6–11. The administrative process available to Ms. Crull was
13 limited to reconsideration of DEL's decision to deny Ms. Crull's license renewal.

14 See ECF No. 37-2 at 2 (noting that "you may request a reconsideration of this
15 decision by DEL" and "[t]o request a hearing . . . request a hearing in writing and
16 state the reason for contesting the decision"). There is no indication that either
17 DEL, when reconsidering the licensing decision, or the Office of Administrative
18 Hearings could adjudicate the common law tort claims raised by Ms. Crull in this
19 lawsuit. The causes of action alleged against Defendants arise from DSHS'
20 investigation into the fraud allegations, not DEL's licensing decision. As such, the
Court will not dismiss the common law tort causes of action on the basis of failure
to exhaust administrative remedies.

1 **C. Whether Genuine Issues of Material Fact Preclude Summary Judgment**
2 **on Ms. Crull's Negligent Investigation Cause of Action**

3 Ms. Crull alleges that Defendants are liable for failing to “exercise
4 reasonable care in investigating claims, in alleging wrongdoing, in reasonably
5 enforcing DSHS laws, in disclosing allegations, in protecting the privacy and
6 providing due process of law to those in a position such as Plaintiff.” ECF No. 1-1
7 at 6. Defendants argue that (1) Washington State does not recognize a claim for
8 negligent investigation and, alternatively, that (2) the public duty doctrine
9 precludes liability for Defendants’ allegedly negligent conduct. ECF No. 29 at 23–
10 24.

11 “In general, Washington common law does not recognize a claim for
12 negligent investigation because of the potential chilling effect such claims would
13 have on investigations.” *Janaszak v. State*, 173 Wn. App. 703, 725 (2013). The
14 exception to this general rule permits negligent investigation causes of action
15 against DSHS caseworkers concerning statutorily mandated investigations into
16 allegations of child abuse. *Lesley v. Dep’t of Social and Health Servs.*, 83 Wn.
17 App. 263, 273 (1996) (noting that “a specific statute provides that DSHS
18 caseworkers have a duty to investigate. A cause of action for negligent
19 investigation thus exists against DSHS caseworkers”).

20 Ms. Crull argues that “Washington courts have recognized a cause of action
21 for negligent investigation specifically against DSHS case workers where a

1 statutory duty to investigate exists.” ECF No. 58 at 27. OFA is specifically tasked
2 by statute to “[c]onduct independent and objective investigations of fraud and
3 abuse.” RCW 74.04.012(3)(a). Ms. Crull, however, mischaracterizes Washington
4 State case law. Contrary to Ms. Crull’s assertion, *Lesley* did not hold that a
5 negligent investigation cause of action is permitted whenever an agency or official
6 has a statutory duty to investigate. *Corbally v. Kennewick Sch. Dist.*, 94 Wn. App.
7 736, 740 (1999). In fact, “[n]o court has extended the DSHS caseworker
8 exception.” *Id.*

9 The statute at issue in *Lesley*, RCW 26.44.050, creates a duty by mandating
10 that DSHS caseworkers “must investigate” reported allegations of child abuse.
11 RCW 26.44.050; *Lesley*, 83 Wn. App at 273 (noting that RCW 26.44.050
12 “provides that DSHS caseworkers have a duty to investigate”). By contrast, RCW
13 74.04.012 merely instructs that OFA, as an administrative agency, “shall conduct
14 independent and objective investigations.” RCW 74.04.012(3)(a). RCW 74.04.012
15 sets out OFA’s statutory objectives and purpose, while RCW 26.44.050 directly
16 creates a duty for DSHS caseworkers to investigate allegations of child abuse.
17 Compare RCW 74.04.012 with RCW 26.44.050. Washington State courts have
18 consistently declined to expand the negligent investigation cause of action. See
19 *Corbally*, 94 Wn. App. at 740. This Court will not break with that consensus.
20

1 As a cause of action for negligent investigation is not cognizable against
2 Defendants under Washington State law, Ms. Crull's cause of action for negligent
3 investigation is **dismissed with prejudice.**

4 **D. Whether Genuine Issues of Material Fact Preclude Summary Judgment
5 on Ms. Crull's Negligent Infliction of Emotional Distress Cause of
6 Action**

7 Ms. Crull alleges that Defendants are liable for negligent infliction of
8 emotional distress. ECF No. 1-1 at 6. "A plaintiff may recover for negligent
9 infliction of emotional distress if she proves duty, breach, proximate cause,
10 damage, and 'objective symptomatology.'" *Kumar v. Gate Gourmet Inc.*, 180
11 Wn.2d 481, 505 (2014) (quoting *Strong v. Terrell*, 147 Wn. App. 376, 387 (2008)).
12 "[A] claimant must prove that her emotional distress is accompanied by objective
13 symptoms and the emotional distress must be susceptible to medical diagnosis and
14 proved through medical evidence." *Strong*, 147 Wn. App. at 388 (citing *Kloepfel v.
Bokor*, 149 Wn.2d 192, 197 (2003)).

15 Ms. Crull has presented no objective evidence of medical symptomatology
16 resulting from Defendants' alleged negligence. Although Ms. Crull notes that
17 "Defendants' conduct . . . certainly [rises] to the level of negligence," ECF No. 58
18 at 35, negligent infliction of emotional distress requires more than a mere
19 allegation of negligence. As such, Ms. Crull has failed to demonstrate a genuine

1 dispute of material fact as pertains to her negligent infliction of emotional distress
2 cause of action, which accordingly is **dismissed with prejudice**.

3 **E. Whether Genuine Issues of Material Fact Preclude Summary Judgment**
4 **on Ms. Crull's Intentional Infliction of Emotional Distress Cause of**
Action

5 Ms. Crull alleges that Defendants are liable for intentional infliction of
6 emotional distress, or outrage. ECF No. 1-1 at 7. The tort of outrage requires:
7 “(1) extreme and outrageous conduct, (2) intentional or reckless infliction of
8 emotional distress, and (3) actual result to plaintiff of severe emotional distress.”

9 *Kloepfel*, 149 Wn.2d at 195. “The question of whether certain conduct is
10 sufficiently outrageous is ordinarily for the jury, but it is initially for the court to
11 determine if reasonable minds could differ on whether the conduct was sufficiently
12 extreme to result in liability.” *Dicomes v. State*, 113 Wn.2d 612, 630 (1989).

13 “The first element requires proof that the conduct was ‘so outrageous in
14 character, and so extreme in degree, as to go beyond all possible bounds of
15 decency, and to be regarded as atrocious, and utterly intolerable in a civilized
16 community.’” *Robel v. Roundup Corp.*, 148 Wn.2d 35, 51 (2002) (quoting
17 *Dicomes*, 113 Wn.2d at 630)). Severe emotional distress is such that “no
18 reasonable man could be expected to endure it.” *Kloepfel*, 149 Wn.2d at 203
19 (quoting Restatement (Second) of Torts § 46 cmt. k (1965)).

1 Ms. Crull alleges that the following actions were sufficiently outrageous to
2 be tortious: (1) “that Mr. Bunge and Mr. Lowe knew that their investigation into
3 Ms. Crull’s business would cause DEL to disqualify her license”; and (2) that
4 “Defendants knew and intended for the media to be present when DSHS and law
5 enforcement executed the search warrant on Ms. Crull’s property.” ECF No. 58 at
6 34–35.

7 The Court finds that Defendants’ actions, as alleged by Ms. Crull, do not
8 approach the outer threshold of “outrage” as defined by the Supreme Court of
9 Washington. The allegations do not “shock the conscience or go beyond all sense
10 of decency.” *Lyons v. U.S. Bank Nat. Ass’n*, 181 Wn.2d 755, 793 (2014). Further,
11 Ms. Crull does not testify that she suffered emotional distress at all, only alleging
12 that DSHS’ tactics “severely damaged [her] reputation” and “severed [her]
13 livelihood.” ECF No. 60 at 25. As Ms. Crull has failed to demonstrate a genuine
14 issue of material fact as to outrage, her intentional infliction of emotional distress
15 cause of action is **dismissed with prejudice**.

16 **F. Whether Genuine Issues of Material Fact Preclude Summary Judgment
on Ms. Crull’s Defamation Cause of Action**

17 Ms. Crull alleges that Defendants are liable for defamation for “[f]alse
18 allegations that Plaintiff was defrauding the State of more than \$100,000.” ECF
19 No. 1-1 at 8.
20

1 In Washington, “a defamation plaintiff must show four essential elements:
2 falsity, an unprivileged communication, fault, and damages.” *Mark v. Seattle*
3 *Times*, 96 Wn.2d 473, 486 (1981). “A defamation claim must be based on a
4 statement that is provably false.” *Schmalenberg v. Tacoma News, Inc.*, 87 Wn.
5 App. 579, 590 (1997). “If the plaintiff is a private individual, a negligence standard
6 of fault applies.” *Bender v. City of Seattle*, 99 Wn.2d 582, 600 (1983).

7 As to defamation, Washington State law recognizes both an absolute and a
8 qualified privilege:

9 [a]n absolute privilege or immunity is said to absolve the defendant of
10 all liability for defamatory statements. A qualified privilege, on the
11 other hand, may be lost if it can be shown that the privilege has been
12 abused. Absolute privilege is usually confined to cases in which the
13 public service and administration of justice require complete immunity.
14 Legislatures in debate, judges and attorneys in preparation or trial of
cases, statements of witnesses or parties in judicial proceedings, and
statements of executive or military personnel acting within the duties
of their offices are frequently cited examples. Generally, some
compelling public policy justification must be demonstrated to justify
the extraordinary breadth of an absolute privilege.

15 *Id.* (internal citations omitted). By way of contrast, police officers only enjoy a
16 qualified privilege when releasing information to the public. *Id.* at 601 (qualified
17 privilege where news of plaintiff’s arrest was made available to the news media,
18 and stories appeared in three newspapers as well as on television and radio).

19 Ms. Crull claims that Defendants reported to the news media and public that
20 Ms. Crull had engaged in a “pattern of fraudulent billing that . . . took place during

1 [a] five month of 2010.” ECF No. 58 at 35. As evidence, Ms. Crull notes five
2 online news articles reporting on the LLLC.⁹ *See* ECF No. 62-6, 7, 8, 9, 10. Of
3 those articles, two do not report any specific statements made by state officials. *See*
4 ECF No. 62-7 (article concerning distressed parents collecting children from
5 daycare); ECF No. 62-10 (quoting language from Ms. Crull’s letter of
6 disqualification). Two others state that the reported information was obtained from
7 the affidavit that accompanied OFA’s application for a search warrant. *See* ECF
8 No. 62-6 (“Based on the pattern of fraudulent billing the state claims took place
9 during that five month time frame in 2010, authorities believe, according to the
10 search warrant, that the child care center may have submitted other fraudulent
11 billings since Little Lambs Learning Center opened in 2008”); ECF No. 62-9
12 (“Investigators searched the Little Lambs Learning Center . . . for evidence that its
13 owner has been overbilling the state for the subsidized day care, according to an
14 affidavit for a search warrant”). The final article attributes statements to DSHS
15 describing the investigation. *See* ECF No. 62-8.

16

17

18 ⁹ While there is evidence that Defendant Lowe spoke to the media, *see* ECF No. 40
19 at 4, Ms. Crull does not direct the Court’s attention to any reported information
20 apart from the five online news articles.

1 “Proof of knowledge or reckless disregard as to the falsity of a statement is
2 required to establish abuse of a qualified privilege.” *Parry v. George H. Brown &*
3 *Assocs., Inc.*, 46 Wn. App. 193, 197 (1986). “To prove actual malice, plaintiff must
4 show that the defendant in fact entertained serious doubts as to the truth of the
5 statement; it is not shown by a mere failure to reasonably investigate.” *Id.*

6 Ms. Crull claims that “Defendants abused their qualified privilege by acting
7 with actual malice in contacting the news media ahead of their raid on Little
8 Lambs and providing inflammatory statements to the media about the accusations
9 against Ms. Crull.” ECF No. 58 at 36. While Ms. Crull denies having defrauded the
10 State and alleges that Defendants colluded with DEL in order to disqualify her
11 license, she offers no evidence that demonstrates Defendants “in fact entertained
12 serious doubts as to the truth” of any statement allegedly made to the media.

13 The Court finds that it is unnecessary to determine whether Defendants
14 enjoyed an absolute or qualified privilege as, even if Defendants are protected by a
15 lesser, qualified privilege, Ms. Crull has failed to demonstrate a genuine issue of
16 material fact as to whether Defendants abused, and consequently forfeited, their
17 privilege. Ms. Crull has not offered specific evidence demonstrating that
18 Defendants acted with malice, instead demanding that the Court infer malice from
19 the mere fact that Defendants allegedly discussed their investigation with the press.
20

Even assuming that Ms. Crull was not defrauding the State, the Court cannot infer that Defendants “entertained serious doubts” as to their allegations merely from the fact that those allegations may have been ultimately unsubstantiated. As Ms. Crull has offered no evidence demonstrating abuse, Defendants retain, at a minimum, a qualified privilege shielding them from liability for any allegedly defamatory statements made to the media concerning their fraud investigation.

Ms. Crull’s defamation cause of action is **dismissed with prejudice**.

G. Whether Genuine Issues of Material Fact Preclude Summary Judgment on Ms. Crull’s Invasion of Privacy Cause of Action

Ms. Crull alleges that (1) Defendants falsely disclosed to the public that Plaintiff defrauded the State of over \$100,000, thus placing her in a false light, and (2) Defendants intentionally intruded into Ms. Crull’s seclusion by questioning Ms. Crull’s daughter about issues unrelated to their investigation. ECF No. 58 at 8–9. Defendants’ briefing only discusses the false light allegation. ECF No. 29 at 29. However, as both parties addressed the intrusion into seclusion allegation during oral argument, the Court will discuss the claim.

An invasion of privacy cause of action under a false light theory arises when “someone publicizes a matter that places another in a false light if (a) the false light would be highly offensive to a reasonable person and (b) the actor knew of or recklessly disregarded the falsity of the publication and the false light in which the

1 other would be placed.” *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 470–71
2 (1986).

3 Ms. Crull alleges that Defendants placed her in a false light by “falsely
4 disclosing to the public that Ms. Crull defrauded the State of over \$100,000.” ECF
5 No. 58 at 37. As evidence of falsity, Ms. Crull simply denies the allegations and
6 asserts that the lack of criminal charges is sufficient evidence to demonstrate actual
7 malice. *Id.* at 37–38. Similar to her defamation claim, Ms. Crull fails to provide
8 any evidence that Defendants “knew of or recklessly disregarded the falsity of the
9 publication” at the time the search warrant was executed in 2011. In the absence of
10 any such evidence, Ms. Crull has failed to demonstrate a genuine issue of material
11 fact concerning her invasion of privacy cause of action under a false light theory.

12 “One who intentionally intrudes, physically or otherwise, upon the solitude
13 or seclusion of another or his private affairs or concerns, is subject to liability to
14 the other for invasion of privacy, if the intrusion would be highly offensive to a
15 reasonable person.” *Mark*, 96 Wn.2d at 497 (quoting Restatement (Second) of
16 Torts § 652B at 378 (1977)). “A person may sue the government for common law
17 privacy invasion if it intentionally intrudes upon his or her solitude, seclusion, or
18 private affairs.” *Youker v. Douglas Cty.*, 178 Wn. App. 793, 797 (2014). In *Youker*,
19 the court affirmed a summary dismissal of an intrusion into seclusion invasion of
20 privacy cause of action where police officers were legitimately investigating a

1 report of a firearm in the home of a convicted felon. *See id.* The court noted that
2 “[t]he record contains no suggestion they acted under pretext.” *Id.*

3 The Court finds that Ms. Crull has not alleged a cognizable invasion of
4 privacy, intrusion into seclusion, cause of action. Ms. Crull’s claim of intrusion
5 into seclusion arises out of Defendants’ alleged questioning of Ms. Crull’s
6 daughter as part of their criminal investigation. ECF No. 1-1 at 9. Ms. Crull’s
7 daughter was being interviewed in her capacity as one of the LLLC’s employees.
8 Similar to the false light invasion of privacy cause of action, there is no indication
9 that Defendants had any pretextual or nefarious motive when questioning
10 Ms. Crull’s daughter. The Court finds that Ms. Crull has failed to allege a
11 cognizable claim concerning her invasion of privacy cause of action based on
12 intrusion into seclusion. Ms. Crull’s invasion of privacy cause of action is therefore
13 **dismissed with prejudice.**

14 **H. Whether Genuine Issues of Material Fact Preclude Summary Judgment**
15 **on Ms. Crull’s Tortious Interference with Business Relationships Cause**
of Action

16 Ms. Crull alleges that Defendants’ investigation tortiously interfered with
17 her contractual relationships with her clients. ECF No. 1-1 at 7. Ms. Crull alleges
18 that Defendants investigated the fraud allegations using improper and overzealous
19 means. ECF No. 58 at 32. The crux of Ms. Crull’s claim appears to be both that
20 Defendants unnecessarily involved the media when executing the search warrant,

1 ECF No. 59 at 28, 40–41,¹⁰ and that Defendants knew their investigation would
2 cause the disqualification of her license and actively continue to harass her by
3 stalling their investigation. ECF No. 58 at 33.¹¹

4 In Washington, tortious interference with contractual relations requires
5 “(1) the existence of a valid contractual relationship or business expectancy;
6 (2) knowledge of the relationship or expectancy on the part of the interferor;
7 (3) intentional interference inducing or causing a breach or termination of the
8 relationship or expectancy; and (4) resultant damage.” *Calbom v. Knudtzon*, 65
9 Wn.2d 157, 162–63 (1964). The interference must also arise from “either the
10 defendant’s pursuit of an improper objective of harming the plaintiff or the use of
11

12 ¹⁰ Ms. Crull states that Defendants did not make it clear to the media that the
13 investigation was for fraud as opposed to child abuse. ECF No. 58 at 33. As the
14 only news articles cited by Ms. Crull specifically mention the fraud investigation,
15 see ECF No. 62-6, 7, 8, 9, 10, this allegation is unsupported by the record and will
16 not be considered by the Court.

17 ¹¹ Ms. Crull also discusses Defendants’ alleged failure to both timely return her
18 documents and provide her with a hearing. ECF No. 58 at 33. However, Ms. Crull
19 fails to explain how these allegations are related to the tortious interference cause
20 of action.

1 wrongful means that in fact cause injury to plaintiff's contractual or business
2 relationships." *Pleas v. City of Seattle*, 112 Wn.2d 794, 803–04 (1989).

3 For example, the City of Burien was found to have tortiously interfered with
4 a plaintiff by singling out the plaintiff's proposed development and using the
5 permitting process to delay the project. *Westmark Dev. Corp. v. City of Burien*, 140
6 Wn. App. 540, 558 (2007). The court found that improper delay was actionable as
7 an improper means of interfering with a plaintiff's business expectancy. *Id.* at 560.
8 Improper delay was also discussed in *Woods View II, LLC v. Kitsap County*, 188
9 Wn. App. 1, 34 (2015). In *Woods View*, the court distinguished *Westmark* as "[t]he
10 evidence revealed that Burien had incorporated in part to stop the development of
11 apartment buildings." *Id.* Further, the *Westmark* permit was delayed "for a period
12 of years when the typical response time was 30 to 120 days." *Id.* The court found
13 that a nineteen month delay on a decision that should take no more than 78 days
14 was not "extraordinary" as the plaintiff could not demonstrate that the delay was
15 improper. *Id.*

16 Ms. Crull alleges that Defendants have delayed concluding their
17 investigation by four years. However, it appears that Defendants concluded their
18 investigation on September 5, 2012, less than a year after the search warrant was
19 executed on the LLLC. *See* ECF No. 39-1. Further, Ms. Crull has offered no
20 evidence of any nefarious or improper motivation behind the alleged delay.

1 Ms. Crull instead argues that a lengthy delay is itself sufficient evidence of a
2 defendant's improper purpose. While extraordinary delay can form the basis of a
3 tortious interference cause of action, the plaintiff must demonstrate that the delay
4 occurred due to a defendant's improper motivation. *See Woods View*, 188 Wn.
5 App. at 34. As Ms. Crull has failed to present any evidence that any action by
6 Defendants was improperly motivated, she has failed to demonstrate a genuine
7 issue of material fact concerning whether the alleged delay constituted tortious
8 interference.

9 Ms. Crull further alleges that Defendants' excessive involvement of the
10 media was improper and constitutes tortious interference. As with the allegation of
11 extraordinary delay, Ms. Crull has submitted no evidence that Defendants' alleged
12 media contact was improper except for the fact that she wishes Defendants had not
13 involved the media at all. Ms. Crull has not offered any authority that official
14 media contacts concerning issues of public interest such as an ongoing criminal
15 investigation are improper. As such, Ms. Crull has failed to demonstrate a genuine
16 issue of material fact as concerns her tortious interference claim based on
17 Defendants' media contacts.

18 Ms. Crull has failed to demonstrate a genuine issue of material fact as to her
19 tortious interference with business relations cause of action. While Ms. Crull has
20 proffered a number of different theories, she has failed to provide any evidence

that the allegedly improper means were in fact improper. As such, Ms. Crull's tortious interference with business relations cause of action is **dismissed with prejudice.**

CONCLUSION

Accordingly, IT IS HEREBY ORDERED:

1. Defendants' Motion for Summary Judgment, ECF No. 29, is **GRANTED**. Plaintiff's Complaint, ECF No. 1-1, is **DISMISSED with prejudice**.
 2. **Judgment** is **ENTERED** in favor of Defendants.
 3. All pending motions, if any, are **DENIED AS MOOT**.
 4. All scheduled court hearings, if any, are **STRICKEN**.

The District Court Clerk is directed to enter this Order, to provide copies to counsel, and to **close this case**.

DATED this 28th day of December, 2015.

s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
Chief United States District Judge